

ORDER

Ecology's Order No. DE 90-C266 is AFFIRMED. Appellants Thurlow shall cease all diversions of Beaver Creek water into Thurlow Lake.

DONE this 11th day of December, 1991.

POLLUTION CONTROL HEARINGS BOARD


ANNETTE S. M^cGEE, Presiding


JUDITH A. BENDOR, Member

0057B

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
PCHB NO. 90-235

VIII

A water shortage in the Beaver Creek drainage has required closure of the Creek to further consumptive appropriation from May 1 to October 1 of each year. WAC 173-548-050. There can be no additional withdrawals of Beaver Creek water during this closed period. Id.

IX

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following

1 The Thurlows have not applied to Ecology for a permit to appropriate
2 water to Thurlow Lake, nor has such a permit been issued.

3 V

4 The state's permitting system is an exercise of the state's
5 police power. Ecology v. Abbott 103 Wn.2d 686, 696, 694 P.2d 1071
6 (1985). Such permit requirements allow the state to efficiently
7 implement the state water policy, which is to:

8 *[p]romote the use of the public waters in a fashion*
9 *which provides for obtaining maximum net benefits*
10 *arising from both diversionary uses of the state's*
11 *public waters and the retention of waters within*
streams and lakes in sufficient quantity and quality
to protect instream and natural values and rights.

12 RCW 90.03.005.

13 VI

14 The water diverted into Thurlow Lake exceeds the rights to the
15 Thurlow's predecessor in the 1921 decree. It is not used for the
16 purpose stated in the decree and certificate, and therefore is an
unauthorized diversion.

17 VII

18 The Thurlows were properly subjected to regulation because they
19 did not have either an adjudicated storage right, or a subsequently
20 issued permit for storage in Thurlow Lake. Pursuant to the authority
21 in RCW 43.21A.064 and Chapt. 90.03 RCW, Ecology properly issued Order
22 NO. DE 90-C266, requiring the Thurlows cease all diversions of Beaver
23 Creek into Thurlow Lake.

24
25
26 FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
27 PCHB NO. 90-235

1 pursuant to the provisions of Chapt. 90.03 RCW, State v. Thurlow, et
2 al., Okanogan County Superior Court). The purpose of the Beaver Creek
3 adjudication was to determine all rights and priorities to the use of
4 water under investigation. Any rights which existed prior to the
5 adjudication and entry of the decree are extinguished by entry of a
6 decree which fails to award those rights. McLeary v. Department of
7 Game, 91 Wn.2d 647, 651, 591 P.2d 778 (1979). Mason Thurlow was
8 awarded three water rights from the Beaver Creek decree, including a
9 Class 5 right via the Thurlow ditch. Since the decree failed to award
10 a right for storage in Thurlow Lake, any such pre-existing right was
11 extinguished by entry of the Beaver Creek decree.

12 III

13 RCW 90.03.010 provides that:

14 *Subject to existing rights all waters within the*
15 *state belong to the public, and any right thereto,*
16 *. . . shall be hereafter acquired only by*
appropriation for a beneficial use and in the manner
provided and not otherwise;

17 IV

18 Ecology did concede during the hearing, that providing water for
19 wildlife habitat, was a beneficial use, but

20 RCW 90.023.250 provides that:

21 *Any person . . . hereinafter desiring to appropriate*
22 *water for a beneficial use shall make an application*
23 *to the department for a permit to make such*
24 *appropriation, and shall not use or divert such waters*
until he has received a permit from the department as
in this chapter provided.

1 property. While Thurlow Lake may be available for use by wildlife, it
2 is not utilized by the Thurlows' stock nor are there any diversions
3 from Thurlow Lake to the Class 5 irrigated lands. It has not been
4 proven that waters from the Lake flow subsurface and are thereafter
5 pumped onto the subject irrigated land.

6 VI

7 On November 14, 1990, Ecology issued Order No. DE 90-C266,
8 requiring that the Thurlows cease all diversions of Beaver Creek water
9 into Thurlow Lake. The Thurlows appealed this Order to the Pollution
10 Control Hearings Board, which became PCHB No. 90-235.

11 VII

12 Any Conclusion of Law deemed to be a Finding of Fact is hereby
13 adopted as such. From these Findings of Fact, the Board makes these

14 CONCLUSIONS OF LAW

15 I

16 RCW 90.03.220 provides in part that:

17 *Whenever proceedings shall be instituted for the*
18 *determination of the rights to the use of water, any*
19 *defendant who shall fail to . . . submit proof of his*
20 *claim, shall be estopped from subsequently asserting*
any right to the use of such water embraced in such
proceeding, except as determined by such decree.

21 II

22 The rights to waters of Beaver Creek were adjudicated in 1921
23
24
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB NO. 90-235

1 in the N 1/2 NE 1/4, SW 1/4 NE 1/4, NW 1/4 SE 1/4 of Section 26, T. 33
2 N., R. 22 E. W.M. Certificate of Water Right 246, which was
3 subsequently issued, provides that:

4 [t]he amount of water to which said water right is
5 entitled is limited to the quantity which is
6 reasonably and actually necessary for the purpose
7 aforesaid and shall not exceed 1.59 second feet for
8 the irrigation of 79.58 acres. . . .

9 The Certificate further provides that the water is for the
10 purpose of "irrigation during the period from May 1st to September 15th
11 each year and for the purpose of stock and domestic use
12 continuously." The Beaver Creek decree did not provide for a storage
13 right for Mason Thurlow.

14 III

15 Bernard Thurlow is the successor in interest to the water rights
16 granted in the Beaver Creek decree to Mason Thurlow.

17 IV

18 The Beaver Creek decree provides:

19 That all waters in excess of the total amount
20 apportioned and decreed to the several tracts of land
21 described in the classification, belong to the public
22 and are subject to appropriation.

23 V

24 In addition to transferring irrigation water via the Thurlow
25 ditch, Mr. Thurlow and his predecessors have diverted water to fill a
26 kettle depression known as Thurlow Lake, located north of the Thurlow
27

1 For the respondent: Darrell Monroe and Doug Clausing,
2 Department of Ecology.

3 Exhibits were admitted and examined. Counsel submitted memoranda
4 for the hearing and written closing arguments. From the foregoing,
5 and having reviewed the record and conferred, the Pollution Control
6 Hearings Board orally ruled on October 25, 1991, to affirm Ecology
7 Order No. DE 90-C266, and directed the prevailing party to file a
8 proposed decision. It was filed on November 24, 1991, and reviewed
9 and revised. The Board now enters the following Findings of Fact,
10 Conclusions of Law and Order confirming that oral decision:

11 FINDINGS OF FACT

12 I

13 The Thurlows own property in the NE 1/4 of Section 26, T. 33 N.,
14 R. 22 E. W.M. Thurlows divert water to irrigate this land by removing
15 water from Beaver Creek and conveying water by ditch (the Thurlow
16 ditch).

17 II

18 Pursuant to the provisions of Chapt. 90.03 RCW, the rights to the
19 use of the waters of Beaver Creek were adjudicated in Okanogan County
20 Superior Court in 1921, in State of Washington v. Mason Thurlow and
21 Lois Thurlow, his wife, et al. The decree which issued from this
22 adjudication granted several water rights to Mason Thurlow, including
23 a Class 5 water right through a ditch for the irrigation of 79.6 acres
24

25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB NO. 90-235

Le di

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

BERNARD and S. DIANNE THURLOW,)	
)	
Appellants,)	PCHB No. 90-235
)	
v.)	
)	
STATE OF WASHINGTON, DEPARTMENT)	FINAL FINDINGS OF FACT,
OF ECOLOGY,)	CONCLUSIONS OF LAW
)	AND ORDER
Respondent.)	
<hr/>		

Bernard and S. Dianne Thurlow ("Thurlow") have appealed the Department of Ecology's ("Ecology") Order No. DE 90-C266, requiring they cease all diversions of Beaver Creek water to Thurlow Lake.

The matter concluded on October 18, 1991, with the filing of written closing argument. The formal hearing on the merits was held on September 20, 1991 in Cle Elum. Participating Board Members were Annette McGee, Presiding, and Judith A. Bendor. Appellants Thurlow were represented by Attorney Richard McMenamin, Mount Vernon. Respondent Ecology was represented by Assistant Attorney General Kerry O'Hara, Lacey. The proceedings were recorded by Linda Stevens-Rico, Court Reporter with Jackie Adkins & Associates, Yakima, and affiliated with Gene S. Barker & Associates, Olympia.

At the hearing, the following witnesses were sworn and testified:
For the appellants: Bernard Thurlow and
S. Dianne Thurlow;